

Shutting Down Dissent: Global Responses to Mobile-Fueled “Flash Mobs” and Political Protests

MARIA SCHEID

I. INTRODUCTION

From the revolutionary protests defining the Arab Spring to riots spreading over Greater London to waves of criminal flash mobs occurring across the United States, 2011 was a tumultuous year for free assembly and the mobile technology that supports it. A recent report by the Pew Research Center reveals that in the United States, 83% of adults own some kind of mobile phone, with 51% of respondents saying they used their phone to get information needed right away.¹ Similarly in the United Kingdom, 92% of adults personally own or use a mobile phone.² In Egypt, mobile penetration, measured as the number of active mobile phone numbers within Egypt's population as of December 2011, was 102.76%.³ Given the prevalence and increasing functionality of mobile phones in the world today, it is not surprising to see such a high number of consumers rely on their mobile phones for communication and information of all sorts. This reliance on communication has come to include information relating to planned protests, whether for peaceful demonstration or criminal activity. In response to recent civil

¹ PEW RESEARCH CENTER, PEW INTERNET & AMERICAN LIFE PROJECT, AMERICAN AND THEIR CELL PHONES, *available at* <http://pewinternet.org/Reports/2011/Cell-Phones.aspx>.

² OFCOM, FACTS AND FIGURES 2012, <http://media.ofcom.org.uk/facts>.

³ ARAB REPUBLIC OF EGYPT MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY, ICT Indicators in Brief, January 2012, *available at* http://mcit.gov.eg/Upcont/Documents/Publications_2922012000_Eng%20Flyer.pdf.

disturbance and political unrest, governments around the world have considered strategies targeted to limiting these kinds of communications in an attempt to prevent or mitigate the damages resulting from large groups of individuals gathering upon a designated space for a designated purpose. Most controversial is the idea of silencing the dissent before it even occurs by way of preemptive mobile service shutdown.

This note examines recent events in which the issue of preemptive mobile service shutdown has arisen. First, this note looks at the riots that unfolded in London in which BlackBerry Messenger and other social media sites were blamed for fueling the behavior of the rioters. Second, this note examines the recent flash mobs occurring in the United States and a decision by the Bay Area Rapid Transit to cut cellular service to its underground station in the wake of a planned protest. Third, this note reviews a much stronger approach taken by the Egyptian government during the revolution demanding the overthrow of President Hosni Mubarak, in which all mobile phone and Internet services were cut. Fourth, by comparing and contrasting these events and the community reactions following them, this note considers the legal and human rights issues that U.S. government entities should account for in the future development of U.S. mobile shutdown policies. Finally, this note considers an approach proposed by the California legislature and evaluates whether such an approach strikes the right balance between maintaining the nation's interest in national security and preserving individuals' rights to privacy and autonomy.

II. RIOTS IN LONDON

Following recent widespread riots, the U.K. government has had the task of deciding how best to deal with utilization of mobile technology during times of civil unrest. An initial proposal to preemptively stop communication in anticipation of mobile-fueled rioting was met with resistance, as citizens and government officials alike try to find a balance between the nation's interest in national security and individual privacy and autonomy.

A. The Spark in Tottenham: How the London Riots Unfolded

On August 6, 2011, a peaceful vigil was held in Tottenham, North London, for Mark Duggan, a man shot by police two days earlier

during a vehicle stop.⁴ While the Independent Police Complaints Commission, an independent organization responsible for investigating allegation of police misconduct in England and Wales, automatically began an investigation into the police shooting, many civilians demanded answers surrounding the shooting, calling for justice for a victim of alleged police brutality. Unrest soon unraveled into violence as a group who had gathered outside Tottenham police station set two patrol cars and a double-decker bus on fire.⁵ Protests swelled, local shops were looted, and petrol bombs were thrown at police and buildings.⁶ The protest that took place that night, and in particular the feelings of injustice and frustration surrounding Mr. Duggan's death, became a catalyst for four days of rioting throughout the city of London and beyond.⁷ As the riots escalated, social media sites Twitter and Facebook, and mobile instant messaging service Blackberry Messenger (BBM), received criticism for their perceived role in facilitating illegal activity.⁸ In all, 48,000 businesses suffered financial losses⁹ and five individuals were killed in the riots.¹⁰ As of November 2011, the Association of Chief Police Officers estimated

⁴ Andy Moore, *Riots in Tottenham after Mark Duggan Shooting Protest*, BBC NEWS (Aug. 7, 2011), <http://www.bbc.co.uk/news/uk-england-london-14434318>.

⁵ *Id.*

⁶ *Id.*

⁷ Rioting extended to cities including Manchester, Birmingham, Bristol, Nottingham, and Liverpool. *Further Riots in London as Violence Spreads Across England*, BBC NEWS (Aug. 9, 2011), <http://www.bbc.co.uk/news/uk-england-london-14450248>; Eddie Buckle, Ben Edwards & David Goodman, *London Violence Calmed by Police Reinforcement as Unrest Spreads*, BLOOMBERG (Aug. 10, 2011), <http://www.bloomberg.com/news/print/2011-08-09/police-deployment-calms-london-riots-as-unrest-hits-manchester.html>.

⁸ One BBM obtained by the Guardian read: "Everyone from all sides of London meet up at the heart of London (central) OXFORD CIRCUS!! Bare SHOPS are gonna get smashed up so come get some (free stuff!!!) fuck the feds we will send them back with OUR riot! >:O Dead the ends and colour war for now so if you see a brother... SALUT! if you see a fed... SHOOT!" Matt Wells, *From Enfield to Brixton via Blackberry: London Riots Day Two Roundup*, THE GUARDIAN (Aug. 8, 2011 13:05 EDT), <http://www.guardian.co.uk/uk/blog/2011/aug/08/london-riots-day-two-roundup>.

⁹ Elaine Moore, *Riots Hit Retail Shares at Worst Time*, FINANCIAL TIMES, August 12, 2011 5:58 EDT, <http://www.ft.com/cms/s/2/a60382c6-c1d2-11e0-bc71-00144feabdc0.html#axzz1We4WbJt5>.

¹⁰ House of Commons, Home Affairs Committee, *Policing Large Scale Disorder: Lessons from the Disturbance of August 2011 Volume II*, 3 (Dec. 15, 2011).

costs for policing the disorder to be around £89.827 million (roughly \$138 million), not including compensation for claims of loss by individuals filed under the Riot (Damages) Act 1886.¹¹ On August 11, U.K. Prime Minister David Cameron recalled Parliament, at that time on a summer break, for an emergency debate.¹²

B. Calls to Suspend BlackBerry Instant Messaging and Hints of a Social Media Clampdown

BlackBerry Messenger is a concern for law enforcement and government officials given the prevalence of BlackBerry usage by British teens, and the security and ease the phone provides. At the time of the riots, approximately thirty-seven percent of British teens owned a BlackBerry handset, providing them with BlackBerry Messenger (BBM).¹³ BBM allows users to send free messages to individuals and to send messages to all their contacts simultaneously.¹⁴ Though tight encryption is limited to BlackBerrys tied to corporate networks and not on BlackBerrys sold to individuals, the belief remained that individuals were using the BlackBerry as a tool for coordinating activity, allowing looters to stay one step ahead of a thinly spread police force.¹⁵ David Lammy, Member of Parliament for Tottenham, in a plea for the suspension of BBM, identified BBM as the reason that criminals were outfoxing the police force, noting that encryption prevented access for the police.¹⁶

Speaking before the House of Commons, U.K. Prime Minister Cameron condemned the actions of the rioters, accepting no excuses

¹¹ *Id.* at 23.

¹² Rob M. Smith, *Riots in UK: Parliament Recalled as Crisis Mounts*, THE HUFFINGTON POST, http://www.huffingtonpost.co.uk/2011/08/09/cameron-on-riots_n_921836.html (last updated Aug. 10, 2011).

¹³ Olivia Solon, *Why Has BlackBerry Been Blamed for the London Riots?*, WIRED (Aug. 9, 2011), <http://www.wired.com/epicenter/2011/08/blackberry-london-riots>.

¹⁴ *Id.*

¹⁵ *The BlackBerry Riots, Rioters Used BlackBerrys Against the Police; Can Police Use Them Against Rioters?*, THE ECONOMIST, Aug. 13, 2011, available at <http://www.economist.com/node/21525976>.

¹⁶ Georgina Prodhan & Alastair Sharp, *MP Calls for BlackBerry Messenger Suspension to Calm UK Riots*, REUTERS, Aug. 9, 2011 12:23 EDT, available at <http://mobile.reuters.com/article/idUSTRE7784EE20110809?irpc=932>.

for the criminality of their acts. Cameron then hinted at a possible preemptive strategy for future protests:

Everyone watching these horrific actions will be struck by how they were organi[z]ed via social media. Free flow of information can be used for good, but it can also be used for ill, so we are working with the police, the intelligence services and industry to look at whether it would be right to stop people communicating via these websites and services when we know they are plotting violence, disorder and criminality.¹⁷

Acting Metropolitan Police Commissioner Tim Godwin also appeared before the Home Affairs Committee, stating: "I contemplated seeking the authority to switch [social media sites] off. The legality of that is very questionable. We did not request that it was turned off but it is something we are pursuing as part of our investigative strategy."¹⁸

C. Shutting Down Mobile Services in Times of Civil Disturbance

U.K. law does not directly address whether it is permissible for the government to preemptively shut down mobile services in the context of the type of riots that occurred. Some existing law, however, guides the analysis.

1. European Convention on Human Rights and Human Rights Act 1998

As a founding member of the Council of Europe, the United Kingdom ratified the European Convention on Human Rights on

¹⁷ House of Commons, Publications and Records, Aug. 11, 2011, Column 1053, available at <http://www.publication.parliament.uk/pa/cm201011/cmhansrd/cm110811/debtext/110811-0001.htm>.

¹⁸ Mark Hughes & Raf Sanchez, *London Riots: Met Chief Tim Godwin Considered Shutting off Twitter*, THE TELEGRAPH (Aug. 16, 2011 12:52PM BST), <http://www.telegraph.co.uk/news/politics/8704239/London-riots-Met-chief-Tim-Godwin-considered-shutting-off-Twitter.html>.

March 8, 1951.¹⁹ Any law that the U.K. government seeks to establish or rely on to support a right to suspend mobile service in anticipation of protests or criminal activity must therefore comply with Article 8 of the ECHR. Article 8 provides:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²⁰

Consistent with Article 8, the British Home Office, the ministerial department responsible for security and accountable policing within the U.K., recognizes that in the case of communication interception, data should be acquired only under strict safeguards and the interception must not unduly interfere with individual privacy or civil liberties.²¹

The Human Rights Act 1998 (Human Rights Act), an Act of the United Kingdom Parliament “giving further effect to the right[s] and freedoms guaranteed under the ECHR,”²² also establishes the right to freedom of expression.²³ Article 10 provides that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

¹⁹ COUNCIL OF EUROPE, United Kingdom, *available at* <http://www.coe.int/web/coe-portal/country/united-kingdom?dynLink=true&layoutId=173&dlgroupId=10226&fromArticleId>.

²⁰ EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe Treaty Series, No. 5, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/O/CONVENTION_ENG_WEB.pdf.

²¹ Communications Data, HOME OFFICE, <http://www.homeoffice.gov.uk/counter-terrorism/communications-data> (last visited Mar. 17, 2013).

²² Human Rights Act, 1998, c. 42, Introductory Text (Eng.).

²³ Human Rights Act, 1998, c. 42, sch. 1, Art. 10 (Eng.).

without interference by public authority and regardless of frontiers.”²⁴ This freedom, however, may be subject to limitations when such limitations are prescribed by law and necessary for interests, such as national security, public safety, or the prevention of disorder or crime.²⁵ Likewise, Article 11 establishes that everyone has the right to freedom of peaceful assembly and association, subject to the same limitations mentioned for Article 10.²⁶

2. Regulation of Investigatory Powers Act 2000

In recognition of individual privacy and civil liberties, the Regulation of Investigatory Powers Act 2000 (RIPA), an Act of Parliament, limits the point at which communications transmitted by a public postal service or public communication system can be obtained, the extent of the communications that may be revealed, and who may obtain that information.²⁷ The Act requires public authorities, including police and government departments, to obtain private information in a way that is necessary, proportionate, and compatible with human rights.²⁸ RIPA allows for the interception of a communication sent by a telecommunications system, but authorization has to flow from a warrant issued by the Secretary of State.²⁹ Disclosure of that information may also be obtained so long as it falls within the scope of the warrant.³⁰ The Secretary of State is not to issue a warrant unless it is deemed necessary for reasons that may include the interest of national security or for the purpose of preventing or detecting serious harm.³¹ Furthermore, the conduct authorized by the warrant must be proportionate to what is sought to

²⁴ *Id.*

²⁵ *Id.*

²⁶ Human Rights Act, 1998, c. 42, sch. 1, Art. 11 (Eng.).

²⁷ Regulation of Investigatory Powers Act, 2000, c. 23, Introductory Text (Eng.) [hereinafter RIPA].

²⁸ Regulation of Investigatory Powers Act, 2000, Home Office, <http://www.homeoffice.gov.uk/counter-terrorism/regulation-investigatory-powers>.

²⁹ RIPA, 2000, c. 1, § 5(1)(a) (Eng.).

³⁰ *Id.* at § 5(1)(d).

³¹ *Id.* at §§ 5(2)-(3).

be achieved by that conduct.³² In addition, an interception warrant must name or describe either one person as the subject of the warrant, or single set of premises, or a location, related to the planned interception.³³ The data obtained through interception or disclosure may include traffic data and additional information outside of the content of the communication.³⁴ This traffic data, when coupled with other sources of information, such as closed-circuit television images, allows law enforcement to identify culprits.³⁵

3. *Civil Contingencies Act 2004 and Communications Act 2003*

Beyond interception and disclosure permitted under RIPA, two additional Acts of Parliament allow for certain constraints on communication. The Civil Contingencies Act 2004 provides for broad powers in times of emergency. Under the Act, the Queen is allowed to make regulations when an event or situation threatens serious damage to human welfare, causing loss of human life, human injury or illness, or damage to property.³⁶ In times of emergency, regulations may be made to prohibit, or enable the prohibition of, assemblies of a specified kind, place, or time.³⁷ No regulation, however, may amend the Human Rights Act 1998.³⁸

The Communications Act 2003 allows the Secretary of State to require suspension or restriction of a person's entitlement to provide an electronic communications network or electronic communications service.³⁹ The Secretary of State may require the Office of Communications to issue a direction to the person ("the relevant provider") to comply with the Secretary of State's order that such

³² *Id.*

³³ *Id.* at § 8(1).

³⁴ *Id.* at § 21(4).

³⁵ *The BlackBerry Riots, Rioters Used BlackBerrys Against the Police; Can Police Use Them Against Rioters?*, *supra* note 15.

³⁶ Civil Contingencies Act, 2004, c. 36, Part I, § 1(1)-(2) (Eng.).

³⁷ *Id.* at § 22(3)(f).

³⁸ *Id.* at § 23(5)(b).

³⁹ Communications Act, 2003, c. 21, § 132 (Eng.).

networks or services be suspended or restricted.⁴⁰ In giving this direction, the Secretary of State must have reasonable grounds for believing that it is necessary to do so to either protect the public from any threat to public safety or public health, or to do so in the interest of national security.⁴¹

D. Moving Forward: Home Affairs Committee Meets with Law Enforcement and Social Media Representatives

An observation commonly noted by local police following the London riots was the positive and productive use of social media during the time of disturbance. While social media sites, especially BBM, were heavily blamed as facilitators, many users also used the communication tools as a way to avoid the escalating situation, alert others of their safety, and later coordinate cleanup efforts.⁴² In addition, law enforcement used social media to reach citizens quickly, informing them of the dangerous situation that was unfolding.⁴³ According to law enforcement, social media played a role in more easily identifying and targeting suspected criminals.⁴⁴

Because of the benefits social media sites confer on law enforcement, authorities acknowledge that, on balance, a suspension would perhaps not be the best option in times of civil unrest. Boris Johnson, Mayor of London, and Tim Godwin, Acting Commissioner of the Metropolitan Police State, consider the shutting down of social media sites, including BBM, not to be a net positive.⁴⁵ A shutdown

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 60 (question 377 of Chief Constable Peter Fahy).

⁴³ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 16 (U.K.) (question 113 of Tim Godwin); HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 60 (U.K.) (question 377 of Chief Constable Peter Fahy and Assistant Constable Terry Sweeney).

⁴⁴ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 16 (U.K.) (question 113 of Tim Godwin); HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 60 (U.K.) (question 377 of Chief Constable Peter Fahy and Assistant Constable Terry Sweeney).

⁴⁵ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 60 (U.K.) (question 377 of Chief Constable Peter Fahy and Assistant Constable Terry Sweeney).

prevents the accumulation of intelligence otherwise gathered through the monitoring of BBM conversations. The loss of civil liberties, in Mr. Johnson's opinion, would outweigh any gain in security.⁴⁶ Similarly, MP David Lammy who had earlier called for a suspension on BBM, restated his concern that police be on top of intelligence, but admitted he called for the suspension in the heat of the moment.⁴⁷ Mr. Lammy acknowledged that police were able to get order without the suspension.⁴⁸ Research in Motion (RIM), the company behind the BlackBerry, also acknowledged the dual role of BBM communication. Stephen Bates, RIM Managing Director for the U.K. and Ireland, articulated RIM's view to the Home Office that communications in general are a force for good, but also recognized that certain exceptional circumstances may call for a shutdown.⁴⁹ Such circumstances would call for a test requiring a high threshold of necessity and proportionality, a number of checks and balances procedurally in place, and a framework for accountability after the decision.⁵⁰

Although initially blamed substantially for the instigation and facilitation of the riots in London, the actual influence of social media sites and BBM remains questionable.⁵¹ Although one study found a majority of U.K. adults in support of a shutdown should future riots occur,⁵² the Home Office and U.K. Government have since backed

Sweeney); HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 8 (U.K.) (question 58 of Boris Johnson).

⁴⁶ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 8 (U.K.) (question 58 of Boris Johnson).

⁴⁷ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 44 (U.K.) (question 278 of David Lammy MP, Mr. Niche Mpala Mufwankolo and Lynn Radosé).

⁴⁸ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 45 (U.K.) (question 286 of David Lammy MP).

⁴⁹ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 76 (U.K.) (question 521 of Stephen Bates, Richard Allan and Alexander Macgillivray).

⁵⁰ *Id.* at 77.

⁵¹ James Ball, *Two-Thirds Support Social Networking Blackout in Future Riots*, THE GUARDIAN (Nov. 7, 2011), <http://www.guardian.co.uk/media/2011/nov/08/two-thirds-support-social-media-blackout>.

⁵² *Id.*

away from their earlier suggestion.⁵³ In moving forward, the government's focus now appears to be on enhancing law enforcement's own use of social media.⁵⁴

III. U.S. FLASH MOBS AND THE PREEMPTIVE SHUTDOWN OF MOBILE SERVICE BY BAY AREA RAPID TRANSIT

The decision to shut down social media and mobile networks in the face of civil unrest is a decision also being considered, and in one case implemented, by communities across the United States in the wake of violent flash mobs and organized protests. Like the U.K. government, the U.S. government must balance the need for security with the need for privacy, paying particular attention to preserving the guarantee of free assembly under the First Amendment.

A. Utilization of Mobile Phones for "Flash Mobs" in Philadelphia and Cleveland Heights

A growing concern for communities across the United States is the occurrence of violent flash mobs.⁵⁵ These flash mobs occur as youth use cell phones and social media sites to coordinate large influxes of individuals into a designated space for violent or criminal purposes. In Philadelphia, a July 29, 2011 flash mob, consisting of twenty to forty teens, assaulted and robbed pedestrians, resulting in the imposition of a strict curfew on youths under the age of eighteen in certain parts of the city.⁵⁶ And in Cleveland Heights, Ohio, a flash mob on June 26, 2011, resulted in thousands of youths congregating at the Coventry

⁵³ HOME AFFAIRS COMMITTEE, POLICING LARGE SCALE DISORDER, 2011, H.C. 1456-II, at 34-35 (U.K.) (question 229 of Rt. Hon. Theresa May MP).

⁵⁴ *Id.*

⁵⁵ A flash mob is defined as a group of people summoned (as by email or text message) to a designated location at a specified time to perform an indicated action before dispersing. Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/flash%20mob>.

⁵⁶ *City Center Hit by Violent Mob of Teens*, PHILLY.COM (July 29, 2011), http://articles.philly.com/2011-07-29/news/29829730_1_street-robbery-teens-mob; Rick Jervis, 'Flash Mobs' Pose Challenge to Police Tactics, USA TODAY, Aug. 19, 2011, http://www.usatoday.com/news/nation/2011-08-18-flash-mobs-police_n.htm.

Street Fair, intimidating patrons.⁵⁷ Based on the activity in Cleveland Heights and similar activity in Shaker Heights, Ohio,⁵⁸ the Cleveland City Council proposed a solution, in the form of an ordinance, criminalizing the use of social media to plan a riot or other disturbance.⁵⁹ In the wake of the flash mobs, the Cleveland City Council unanimously approved the ordinance, but it was later vetoed by Mayor Frank Jackson who questioned the ordinance's constitutionality.⁶⁰ An additional ordinance became law, however, making it a crime to incite a riot by way of an electronic media device when information from that device, obtained pursuant to law, indicates that the device was intended for criminal use.⁶¹ Questions remain over the constitutionality of such legislation in the face of the First Amendment.

B. Preemptive Mobile Service Shutdown by Bay Area Rapid Transit

On August 11, 2011, the same day U.K. Prime Minister David Cameron recalled Parliament for an emergency debate regarding the ensuing London riots, a planned protest occurred in San Francisco. The protest was in response to a fatal shooting by a Bay Area Rapid Transit (BART) police officer of an individual believed to have been armed with a knife.⁶² With knowledge that organizers would be using mobile devices to coordinate this protest, BART temporarily shut

⁵⁷ Pat Galbincea, *Cleveland Heights Passes Emergency Curfew to Curb Accelerating Problem with Flash Crowds*, THE PLAIN DEALER, June 29, 2011, http://blog.cleveland.com/metro/2011/06/cleveland_heights_passes_emerg.html.

⁵⁸ In Shaker Heights, Ohio between 500 and 1,000 youths descended on a local fireworks display. Tom Feran, *Cuyahoga County Sheriff, Cleveland Heights Meetings to Deal with Flash Mob Activity*, THE PLAIN DEALER, July 8, 2011, http://blog.cleveland.com/metro/2011/07/cuyahoga_county_sheriff_clevel.html.

⁵⁹ Jervis, *supra* note 56.

⁶⁰ Thomas Ott, *Cleveland City Council Upholds Mayor Frank Jackson's Veto on Flash Mobs*, THE PLAIN DEALER, Aug. 17, 2011, http://blog.cleveland.com/metro/2011/08/cleveland_council_upholds_jack.html.

⁶¹ CLEVELAND, OHIO, CODE OF ORDINANCES §§ 605.011, 625.08(a)(6), Ord. No. 1393-11 (Dec. 7, 2011), available at <http://www.dln.com/cr/index2011/December72011.pdf>.

⁶² Brynna Quillin, *BART and the Limits of Free Speech*, BERKLEY POLITICAL REVIEW, Oct. 21, 2011, <http://bpr.berkeley.edu/2011/10/bart-and-the-limits-of-free-speech>.

down wireless and cellular service at its underground stations.⁶³ The primary concern cited by BART authorities was customer safety.⁶⁴

BART offers underground cell phone coverage through arrangements with larger mobile service providers and use of mobile service repeaters.⁶⁵ By shutting down the mobile service repeaters, BART was able to cut mobile service underground by powering down their own equipment, though cellular service still operated above the station.⁶⁶ The shutdown drew sharp criticism from media groups and individuals, and an emergency petition was filed before the Federal Communications Commission (FCC).⁶⁷ On December 1, 2011, the FCC began an investigation of the activities,⁶⁸ and later sought public comments on the permissibility of wireless service interruptions.⁶⁹

⁶³ *Statement on Temporary Wireless Service Interruption in Select BART Stations on Aug. 11*, BAY AREA RAPID TRANSIT (Aug. 12, 2011), <http://www.bart.gov/news/articles/2011/news20110812.aspx> [hereinafter *Statement on Interruption*]; E-mail from Cooper G. Lee to Kevin Franklin, Acting Manager of Security Programs, BART Police Department (Aug. 11, 2011, 09:30 PST), <http://files.cloudprivacy.net/bart-foia-emails-response.pdf>.

⁶⁴ *Statement on Interruption*, *supra* note 63.

⁶⁵ W. Scott McCollough, *Statement on San Francisco BART Cellphone Service Shutdown*, EFF AUSTIN (Aug. 14, 2011), <http://effaustin.org/2011/08/statement-on-san-francisco-bart-cellphone-service-shutdown>.

⁶⁶ Letter from BART to Customers, (Aug. 20, 2011), <http://www.bart.gov/news/articles/2011/news20110820.aspx>.

⁶⁷ See Hamed Aleaziz, *Getting Around BART's Cell Service Shutdown*, MOTHER JONES (Aug. 16, 2011), <http://motherjones.com/mojo/2011/08/bart-cell-phone>; Emergency Petition for Declaratory Ruling of Public Knowledge et. al for Declaratory Ruling That Disconnection of Telecommunications Services Violates the Communications Act (Aug. 29, 2011), *available at* <http://www.publicknowledge.org/files/docs/publicinterestpetitionFCCBART.pdf>.

⁶⁸ Press Release, Federal Commc'n Comm'n, FCC Chairman Julius Genachowski's Statement on BART Policy Adoption (Dec. 1, 2011), *available at* <http://www.fcc.gov/document/fcc-chairman-julius-genachowskis-statement-bart-policy-adoption>.

⁶⁹ Press Release, Federal Commc'n Comm'n, Commission Seeks Comment on Certain Wireless Service Interruptions (Mar. 1, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0301/DA-12-311A1.pdf.

1. *Examining the Legality of BART's Actions*

While U.S. cell phone service has been cut previously in anticipation of emergency terrorist activity,⁷⁰ BART's actions represent the first known U.S. incident of a preemptive mobile shutdown to silence dissent.⁷¹ Some courts have held that telephone companies and other public utilities may properly refuse service that would be used for a patently illegal purpose, or for public nuisance.⁷² Any such refusal, however, would have to be based upon the public utility's own established knowledge that its services are being used for illegal purposes; mere suspicion is not enough.⁷³ In addition, the Supreme Court of California has held that a police-instigated discontinuation of telephone service requires authorities, at a minimum, to obtain "prior authorization to secure the termination of service by satisfying an impartial tribunal that they have probable cause to act, in a manner reasonably comparable to a proceeding before a magistrate to obtain a search warrant."⁷⁴

Federal law likewise reflects the importance of assuring individual access to telephone services. Any shutdown would have to be consistent with the Communication Act of 1934, so-called "Standard Operating Procedure 303", and, of course, the First Amendment.

a. *Communications Act of 1934*

BART's arrangement with mobile service providers allows service to be used underground. In providing telecommunications service, whether as a common carrier, or when acting as an agent for the

⁷⁰ Tom Hays, *Decision to Cut Cell Phone Service in New York Tunnels Questioned*, ASSOCIATED PRESS, July 11, 2005.

⁷¹ David Kravets, *San Francisco Subway Shuts Cell Service to Foil Protest; Legal Debate Ignites*, WIRED (Aug. 15, 2011), <http://www.wired.com/threatlevel/2011/08/subway-internet-shuttering>.

⁷² *Palma v. Powers*, 295 F. Supp. 924, 940 (N.D. Ill. 1969); *Pike v. Southern Bell Tel. & Tel. Co.*, 263 Ala. 59, 61 (Ala. 1955); *Paterson Publ'g. Co. v. New Jersey Bell Tel. Co.*, 21 N.J. 460, 465-66 (N.J. 1956); *Rubin v. Pennsylvania Pub. Util. Comm'n*, 177 A.2d 128, 131 (Pa. 1962).

⁷³ *Pike*, 263 Ala. at 61; *see also Hatteras v. Southwestern Bell Tel. Co.*, 774 F.2d 1341, 1343 (5th Cir. 1985) (assuming without deciding that Plaintiff's telephone service was a protectable property interest which could not be minimized).

⁷⁴ *Sokol v. Pub. Util. Comm'n*, 65 Cal.2d 247, 256 (Cal. 1966).

common carrier, a provider is subject to restrictions imposed by the Federal Communications Commission under the Communications Act of 1934.⁷⁵ Service cannot be discontinued or impaired without first obtaining a certificate from the Commission stating, “neither present nor future public convenience and necessity will be adversely affected.”⁷⁶ The Commission may, however, authorize a temporary or emergency discontinuance upon appropriate request.⁷⁷ Absent such authority, regardless of whether BART is classified as a common carrier, an agent of a common carrier, or a third party, BART would be subject to the restriction in § 333 that “no person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under” the Act.⁷⁸ As a consequence, unless it obtained prior authorization, BART could be liable under § 333 for interference with service provided by all wireless carriers whose customers were affected by a BART decision to shut down its underground mobile service repeaters.

b. Standard Operating Procedure 303

On July 10, 2005, following the terrorist attacks in London, the Port Authority of New York and New Jersey and The Metropolitan Transportation Authority temporarily suspended mobile phone service in four underground tunnels.⁷⁹ Recognizing the need for the codification of such a security power, the National Communications System, an agency within the U.S. Department of Homeland Security that is responsible for coordinating and planning national security and emergency preparedness communications,⁸⁰ approved in 2006 a

⁷⁵ Section 217 of the Act provides that “the act, omission, or failure of any . . . agent, or other person acting for . . . any common carrier or user . . . shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.” The Communications Act of 1934, 47 U.S.C. § 217.

⁷⁶ The Communications Act of 1934, 47 U.S.C. § 214(a).

⁷⁷ *Id.*

⁷⁸ The Communications Act of 1934, 47 U.S.C. § 333.

⁷⁹ Hays, *supra* note 70.

⁸⁰ *About the NCS*, NATIONAL COMMUNICATIONS SYSTEM, <http://www.ncs.gov/about.html> (last visited Feb. 5, 2012).

protocol proposed by government and private sector entities.⁸¹ This protocol, Standard Operating Procedure (SOP) 303 “Emergency Wireless Protocols,” addresses the shutdown and restoration process available to commercial and private wireless networks in the event of a national crisis.⁸² Under SOP 303, wireless network connections can be terminated both within a localized area and within an entire metropolitan area.⁸³ The decision to shut down service is made by “State Homeland Security Advisors, their designees, or representatives of the Department of Homeland Security Operations Center.”⁸⁴ Any such decision must be deemed a necessary action by the National Coordinating Center for Telecommunications (NCC),⁸⁵ who notifies carriers in the affected area of the decision to shut down service.⁸⁶ While this mobile shutdown power has been used in the past, the details surrounding its use remain somewhat vague.⁸⁷ As

⁸¹ AT&T Services, Inc., 3, GN Docket No. 12-52, (filed May 30, 2012), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021920921>.

⁸² THE PRESIDENT’S NATIONAL SECURITY TELECOMMUNICATIONS ADVISORY COMMITTEE, *2006-2007 NSTAC Issue Review*, 139 (2007), *available at* <http://www.ncs.gov/nstac/reports/2007/2006-2007%20NSTAC%20Issue%20Review.pdf>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The National Coordinating Center for Telecommunications is the operational arm of the President’s National Security Telecommunications Advisory Committee (NSTAC), “whose mission is to assist in the initiation, coordination, restoration, and reconstitution of industry and Government national security and emergency preparedness (NS/EP) telecommunications services or facilities during natural disasters, armed conflicts, and terrorist attacks.” *National Coordinating Center for Telecommunications Fact Sheet*, NATIONAL SECURITY TELECOMMUNICATIONS ADVISORY COMMITTEE, http://www.ncs.gov/nstac/reports/fact_sheet/NSTAC_06.pdf.

⁸⁶ THE PRESIDENT’S NATIONAL SECURITY TELECOMMUNICATIONS ADVISORY COMMITTEE, *supra* note 82.

⁸⁷ On the eve of the 2012 NATO Summit in Chicago, media reported the possibility of a mobile service shutdown under SOP 303 for the Summit. Tony Dokoupil, *On the Eve of the NATO Summit, Is Phone Jamming Coming to Chicago?*, THE DAILY BEAST (May 16, 2012), <http://www.thedailybeast.com/articles/2012/05/16/on-the-eve-of-the-nato-summit-is-phone-jamming-coming-to-chicago.print.html> (stating that phone jamming has “routinely been used to secure visits from foreign dignitaries”).

knowledge of the procedure has spread, many have questioned the constitutionality of the process.⁸⁸

c. First Amendment Concerns with Shutting Down Mobile Service

An overriding concern in any government-initiated shutdown of mobile services in anticipation of protest is impeding individuals' free speech and assembly rights under the First Amendment. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people peaceably to assemble."⁸⁹ Under certain conditions, however, speech and the right to assemble may be limited.

One restraint the government may exercise, as determined by the Supreme Court in *Brandenburg v. Ohio*, is to "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁹⁰ BART authorities assert they first learned of the planned August 11 demonstration the week of August 8 along with information about individuals' plans to conduct lawless action, with organization being coordinated by way of cell phones.⁹¹ Moving forward, BART's new policy now allows for an interruption of operation when:

there is strong evidence of imminent lawless activity that threatens the safety of District passengers, employees, and other members of the public, the destruction of District property, or the substantial disruption of public transit services; ... the interruption will substantially reduce the likelihood of such unlawful activity; ... such interruption is essential to protect the safety of District passengers, employees and other

⁸⁸ See Public Knowledge et al., *In the Matter of Certain Wireless Service Interruptions* 10-13, GN Docket No. 12-52 (filed May 30, 2012), available at <https://www.cdt.org/files/pdfs/Wireless-Shutdown-Reply-Comments.pdf>.

⁸⁹ U.S. CONST. amend. I.

⁹⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁹¹ Letter from BART to Customers, *supra* note 66.

members of the public, the destruction of District property, or the substantial disruption of public transit services; and ... such interruption is narrowly tailored to those areas and time periods necessary to protect against the unlawful activity.⁹²

BART's primary justification for its August 2011 action was passenger safety. But, critics have pointed out that the ubiquitous use of cell phones also promotes public safety by providing a means for passengers to contact emergency services and allowing communication to friends and family in times of distress.⁹³ The amended policy adopted by BART acknowledges serious risks to public safety that may occur with interruption of cellular service, and states that such an interruption would be a temporary one.⁹⁴ On its face, this new policy appears to be a move in a direction more in line with the underlying purposes of the First Amendment.

Whether BART's policy will prove constitutional as applied—a critical issue regarding the constitutionality of any preemptive shutdown of mobile service—is the legal status of the speech forum that will be consequently affected. Public forums, areas traditionally available for public expression or otherwise actively created for public expression by the government, are areas in which speech is highly protected.⁹⁵ Traditional public forums are those places “which ‘by long tradition or government fiat have been devoted to assembly and debate.’”⁹⁶ Restrictions on speech based on content, made within a public forum, must be narrowly drawn to achieve a compelling state interest.⁹⁷ Content-neutral limits on speech can be imposed within a public forum through so-called time, place, and manner restrictions if

⁹² *Cell Service Interruption Policy*, BART (Dec. 1, 2011), http://www.bart.gov/docs/final_CSIP.pdf

⁹³ Eva Galperin, *Digital Devices Raise New Free Speech Questions*, *Talk of the Nation*, NPR (Aug. 18, 2011), <http://www.npr.org/2011/08/18/139755302/digital-devices-raise-new-free-speech-questions>.

⁹⁴ *Cell Service Interruption Policy*, *supra* note 85.

⁹⁵ *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

⁹⁶ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

⁹⁷ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

they are narrowly tailored, serve a significant government interest, and leave open sufficient alternative channels of communication.⁹⁸

Whether BART stations count as public forums for purposes of constitutional analysis is uncertain. In *International Society for Krishna Consciousness v. Lee*, the Supreme Court held that an airport terminal operated by a public authority was a non-public forum, noting that airports, unlike traditional public forums, have not historically been made available for speech activity.⁹⁹ In differentiating between public and non-public forums, the Court recognized that property separated from acknowledged public areas may serve to indicate to the public that the property is “a special enclave, subject to greater restrictions.”¹⁰⁰

In the case of BART, its underground stations are open only to paying customers and cell phone use at these stations is a relatively new phenomenon. For these reasons, it is possible that BART’s underground stations would be perceived by courts as similar to the airport terminal found to be a non-public forum in *International Society for Krishna Consciousness v. Lee*, thus requiring only that limitations on speech be reasonable and viewpoint-neutral.¹⁰¹

Finally, in situations such as BART’s where national security is not the primary concern, issues of prior restraint may be raised. An action preemptively shutting down communications technology for the express purpose of impeding speech could conceivably be classified as a prior restraint. Prior restraints include “administrative . . . orders forbidding certain communications when issued in advance of the time that such communications are to occur.”¹⁰² It is not clear whether courts would view a temporary shutdown of mobile service, which would not be explicitly targeting specific speech acts, as falling within this rubric. If it does, however, the Supreme Court has held prior restraints to be permissible only if certain procedural safeguards are

⁹⁸ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

⁹⁹ *International Society for Krishna Consciousness*, 505 U.S. at 680. The Court also cited their analysis in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, in which they noted that a traditional public forum is “property that has as ‘a principal purpose . . . the free exchange of ideas.’” *Id.* at 679 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

¹⁰⁰ *Id.* at 680.

¹⁰¹ U.S. CONST. amend. I.

¹⁰² *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citing M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)).

in place. Drawing an analogy to the safeguards required when government seeks to require speakers to pre-clear their proposed speech with a government censor, it may be that an agency proposing to shut down communications services would have to institute judicial proceedings, at least when practicable in advance, to confirm the constitutionality of its initiative.¹⁰³ Because prior restraints carry a strong presumption against validity, such a judicial procedure, if required, would place a heavy burden of justification on the proposing agency.¹⁰⁴

IV. EGYPT'S PLIGHT AND THE ARAB SPRING

One of the most extreme examples of preemptive mobile service shutdowns occurred in Egypt during the Arab Spring. During a period of public protest, both Internet and mobile services were cut in an attempt to control citizen uprising.

A. The Beating of Khaled Said and the Tahrir Square Protests

In June 2010, Khaled Said was dragged from an Internet café in Alexandria, Egypt, and beaten to death by two police officers.¹⁰⁵ Members of Said's family attributed Said's attack and death to Said's posting of a video purporting to show law enforcement officers dividing up narcotics and cash acquired in an earlier drug bust.¹⁰⁶ Meanwhile, police maintain that, upon seeing police officers, Said swallowed a bag of drugs, resulting in suffocation.¹⁰⁷ At the time of the beating, tension existed throughout Egypt over repeated claims of police torture and corruption, ongoing suppression of political dissent,

¹⁰³ *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1968).

¹⁰⁴ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

¹⁰⁵ Lara Logan, *The Deadly Beating that Sparked Egypt Revolution*, CBSNEWS (Feb. 3, 2011), http://www.cbsnews.com/2100-18563_162-7311469.html.

¹⁰⁶ Marc Champion, *Turmoil in Egypt: Police in Case That Fueled Protests Escape Jail*, WALL ST. J. Feb. 7, 2011, <http://online.wsj.com/article/SB10001424052748703989504576127643959647716.html>.

¹⁰⁷ *Id.*

and arbitrary detention justified by government officials under existing emergency law provisions.¹⁰⁸

Pictures of Said's bruised and disfigured face circulated online, causing outrage among civilians and resulting in the January 25, 2011 protest, which led to the toppling of Hosni Mubarak's thirty-year reign over Egypt.¹⁰⁹ Thousands marched on Tahrir Square in Cairo, and protest organizers relied heavily on social media outlets for coordinating activities.¹¹⁰ Beginning on January 28, in the hope of restricting information and subduing protest, the Egyptian government ordered all Internet service providers (ISPs) to shut down connectivity, though one remained online.¹¹¹ A short time later, mobile communications were also shut off.¹¹²

Five days later, following Mubarak's refusal to step down from office, and with over a million protestors defying a government-ordered curfew, services were at least partially restored.¹¹³ In a change of tactics, Egyptian officials were assigned to send customers pro-government text messages, including details of a rally in support of Mubarak.¹¹⁴

B. *Legality of Mubarak's Orders*

At the time of the 2011 Egyptian protests, Egypt's Constitution acknowledged individual freedom as a natural right, with restrictions on free movement "permitted only by an order necessitated by

¹⁰⁸ HUMAN RIGHTS WATCH, World Report 2010, 490, available at http://www.hrw.org/sites/default/files/related_material/wr2010.pdf.

¹⁰⁹ Maggie Michael, *Khaled Said, Young Man Whose Death Inspired Egypt's Protests, Police Attackers Convicted*, HUFFINGTON POST (Oct. 26, 2011), http://www.huffingtonpost.com/2011/10/26/khaled-said-police-convicted_n_1032884.html.

¹¹⁰ *Timeline: Egypt's Revolution*, ALJAZEERA (Feb. 14, 2011), <http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html>.

¹¹¹ Masashi Crete-Nishihata and Jillian C. York, *Egypt's Internet Blackout: Extreme Example of Just-in-time Blocking*, OPEN NET INITIATIVE (Jan. 28, 2011), <http://opennet.net/blog/2011/01/egypt-s-internet-blackout-extreme-example-just-time-blocking>.

¹¹² *Timeline: Egypt's Revolution*, *supra* note 105.

¹¹³ *Id.*

¹¹⁴ Katie Cassidy, *Egypt Officials Behind Vodafone Texts*, SKY NEWS (Feb. 3, 2011), <http://news.sky.com/home/world-news/article/15922330>.

investigations and the preservation of public security.”¹¹⁵ Citizen rights were further protected by a guarantee of secrecy for telephone calls¹¹⁶ and a right to peaceful and unarmed assembly within the limits of the law.¹¹⁷ These rights could be limited only under a declared state of emergency. Under then-existing law, the President of the Republic could proclaim a state of emergency to be submitted to, and approved by, the People’s Assembly.¹¹⁸ Any declared state of emergency was supposed to be for a limited period of time unless otherwise permitted by the Assembly.¹¹⁹

Orders to shut down the Internet and mobile services were executed under Egypt’s Emergency Law No. 162. Since being reenacted in 1981, the law has regularly been renewed.¹²⁰ In general, the law provided the executive extensive power to “suspend basic rights by prohibiting demonstrations, censoring newspapers, monitoring personal communications, and detaining people indefinitely without charge.”¹²¹ Among the powers granted during this state of emergency was the power of the President to “monitor and seize all publications, advertisements, announcements, or other means of disseminating information.”¹²² The decision to shut down mobile service during protests fell within these powers, but the duration of the law appears to have violated international law under the International Covenant on Civil and Political Rights (ICCPR), of which Egypt is a member. ICCPR Article 4 allows for emergency measures, but requires such measures to be consistent with

¹¹⁵ THE CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 41, English translation is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=189854.

¹¹⁶ *Id.* at art. 45.

¹¹⁷ *Id.* at art. 54.

¹¹⁸ *Id.* at art. 148.

¹¹⁹ *Id.*

¹²⁰ United Nations Human Rights Council, International Commission of Jurists, ICJ Submission to the Universal Periodic Review of Egypt (August 2009), *available at* <http://www.icj.org/IMG/UPRSubmission-Egypt.pdf>.

¹²¹ *Egypt: Cosmetic Changes Can’t Justify Keeping Emergency Law*, HUMAN RIGHTS WATCH (May 13, 2010), <http://www.hrw.org/news/2010/05/12/egypt-cosmetic-changes-can-t-justify-keeping-emergency-law>.

¹²² Emergency Law No. 162 of 1958, Art. 3(2).

obligations under international law.¹²³ This means that, before invoking Article 4, “the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.”¹²⁴ Egypt had an uninterrupted state of emergency since its declaration in 1981.¹²⁵

In May 2011, an Egyptian administrative court fined Mubarak \$34 million for cutting mobile and Internet services and “causing damage to the national economy.”¹²⁶ The state reserved the right to increase the amount over the following year to compensate for any increase in damages.¹²⁷

V. COMPARING GLOBAL RESPONSES TO SILENCING DISSENT

The events that have occurred in the U.K., U.S., and Egypt, and the community reactions following them, help to highlight the legal and human rights issues that should be accounted for in the future development of U.S. mobile shutdown policies.

A. *Affirming the National Commitment to Human Rights*

The proposed shutdown of social media by U.K. Prime Minister David Cameron, the actual shutdown of mobile service by BART officials, and the complete shutdown of mobile services by the Egyptian government, were all met with understandable backlash from civilians, pro-democracy groups, the media, and the social media companies themselves. This response was driven in part by the inconsistency of each shutdown with each respective country’s supposed stance on human rights.

¹²³ International Covenant on Civil and Political Rights, Article 4(1), available at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹²⁴ Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11 (2001), ¶ 2.

¹²⁵ For a discussion of the history and purposes of the emergency rule in Egypt, see Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. REV. 532 (2007).

¹²⁶ Shaimaa Fayed, *Egypt’s Mubarak Fined for Communications Cut*, REUTERS, May 28, 2011, <http://www.reuters.com/article/2011/05/28/us-court-egypt-idUSTRE74RoTA20110528>.

¹²⁷ *Mubarak Fined for Cutting Internet and Phones*, ALJAZEERA (May 28, 2011), <http://www.aljazeera.com/news/africa/2011/05/201152811555458677.html>.

The U.K. and the U.S. laws are guided by concerns over human rights and privacy, as protected by the European Convention on Human Rights and the United States Constitution. At the time of the Arab Spring, Egyptian law was also governed by a Constitution that acknowledged the importance of individual freedom of expression and assembly. Egypt's human rights record has been strongly criticized, in no small part because of the existence of emergency law and Mubarak's brutal governance were at odds with these commitments.¹²⁸

Mubarak's decision to cut Internet and mobile service and preserve the emergency law likewise drew criticism from both the U.S. and the U.K. United States Secretary of State Hillary Clinton urged Egypt to repeal its emergency law,¹²⁹ while both U.S. President Obama and U.K. Prime Minister Cameron called for the Egyptian government to respond to grievances from the Egyptian people, maintaining that it was "essential for Egyptian people to be able to exercise their rights of free assembly and expression."¹³⁰ On April 23, 2012, President Obama reinforced U.S. opposition toward restrictions on assembly and speech through an executive order allowing U.S. officials to impose sanctions against foreign nationals found to have used new technologies to help carry out grave human rights abuses.¹³¹ While the order was directed at individuals aiding the Iranian and Syrian government through use of cell phone tracking and Internet monitoring, "administration officials say it could be expanded in the future to include other

¹²⁸ See Human Rights Council Membership Requires Steps to Address Violations, Egyptian Initiative for Personal Rights & Human Rights Watch (May 2007), available at <http://www.hrw.org/legacy/backgrounders/mena/egypt0507/egypt0507web.pdf>.

¹²⁹ *U.S.: Clinton urges Egypt to Repeal Emergency Law*, L.A. TIMES (Sept. 28, 2011), http://latimesblogs.latimes.com/world_now/2011/09/us-egypt-emergency-law.html.

¹³⁰ *Barack Obama and David Cameron Call for 'an orderly, Egyptian-led transition' of Government*, THE TELEGRAPH (Jan. 30, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8292066/Barack-Obama-and-David-Cameron-call-for-an-orderly-Egyptian-led-transition-of-government.html>; see also 5 Days in August, An Interim Report on the 2011 English Riots, RIOTS COMMUNITIES AND VICTIMS PANEL, 47 (Nov. 2011), available at <http://riotspanel.independent.gov.uk/wp-content/uploads/2012/04/Interim-report-5-Days-in-August.pdf>.

¹³¹ Scott Wilson, *Obama Announces Sanctions for Tech Used in Human Rights Abuses in Iran and Syria*, WASH. POST (Apr. 23, 2012), available at http://www.washingtonpost.com/politics/obama-announces-sanctions-for-tech-used-in-human-rights-abuses-in-iran-and-syria/2012/04/23/gIQAOGm3bT_story.html; Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 24, 2012).

countries using technology to crack down on dissent.”¹³² If the U.S. is to avoid charges of inconsistency between its foreign and domestic policies, its stance on shutting down communications services during times of protest must adhere to the free speech values it urges on other nations.

B. Weighing Alternative Means of Control and Established Policies for Information Access

A preemptive mobile shutdown blocks communication between dissenters, but it also blocks communication between third parties, law enforcement, and 911 emergency services. Following the U.K. riots, law enforcement and political leaders acknowledged the usefulness of mobile technology for both the identification of suspects and prevention of escalating harm, and for use by citizens themselves in maintaining safety and keeping information flowing. Cutting cell phone service completely for the purpose of security may consequently have the unintended effect of creating a more dangerous environment.

Yet law enforcement authorities argue they must have tools at their disposal to control unruly crowds who threaten serious damage to persons and property. When possible, law enforcement should be able to stop activities that threaten serious social harm and gather the information needed to charge anyone culpable for the unlawful infliction of such harm.

Even in the face of public emergencies, however, complete mobile shutdowns should be avoided, if possible, in favor of less draconian, more precisely targeted measures. The U.S. and U.K. have processes in place that allow electronic surveillance upon a judicial finding of probable cause and a particularization of targets. When such surveillance information is collected and pieced together, law enforcement officials can then connect the dots, linking individuals to criminal activities. Ongoing surveillance information also allows law enforcement to mobilize their own forces to respond to continuing illegal activity. If safety is the main justification for shutting down communications service, the end goal might also be obtained by increasing police presence at planned protests or demonstrations.¹³³

¹³² *Id.*

¹³³ Another alternative to curb civil unrest is the use of curfews. Curfews are just as likely as mobile shutdowns, however, to be over inclusive, applying to many more people than those who would be involved in disruptive behavior. And, unlike a communications shutdown, curfews may be easy to evade.

C. A Promising Path Forward: California Senate Bill 1160

A recent approach worth analyzing is the approach adopted in California Senate Bill 1160 (SB 1160), a bill introduced by California State Senator Alex Padilla and enacted unanimously by the California legislature in 2012. Although vetoed by Governor Jerry Brown as “too restrictive,” the bill actually strikes a thoughtful balance between law enforcement needs and the public’s free speech and privacy interests. Citing BART’s action as an impetus for the bill, the legislation would prohibit a government entity, or provider of communications service acting at the request of a government entity, “from intentionally interrupting communication service for the purpose of protecting public safety or preventing use of the service for an illegal purpose, except pursuant to a court order signed by a judicial officer.”¹³⁴ The court order would have to be based on the following findings:

(A) That probable cause exists that the service is being or will be used for an unlawful purpose or to assist in a violation of the law.

(B) That absent immediate and summary action to interrupt communications service, serious, direct, immediate, and irreparable danger to public safety will result.

(C) That the interruption of communications service is narrowly tailored to prevent unlawful infringement of speech that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution, or violate any other rights under federal or state law.¹³⁵

Furthermore, interruption would be authorized only for as long as is reasonably necessary.¹³⁶ In cases of extreme emergency where there

¹³⁴ Senate Bill 1160, available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1160_cfa_20120413_162737_sen_comm.html; Senate Bill 1160 was vetoed by Governor Edmund G. Brown Jr. on September 29, 2012. *Senate Bill 1160 Veto Message*, OFFICE OF THE GOVERNOR (Sept. 29, 2012), http://gov.ca.gov/docs/SB_1160_Veto_Message.pdf.

¹³⁵ Senate Bill 1160, at (b)(1).

¹³⁶ *Id.* at (b)(3).

might be insufficient time to obtain a court order, communications service could be interrupted, so long as the governmental entity responsible for interrupting the service applied for a court order no later than six hours after the commencement of the interruption.¹³⁷

Senate Bill 1160 seeks to preserve individuals' rights to expression and assembly—human rights issues recognized by the U.S., U.K., and Egypt—while at the same time recognizing that under extreme emergency situations, national security and public safety concerns may render a temporary interruption necessary. While this proposed approach is much more favorable to free speech and assembly than the policy originally adopted by BART, there are several respects upon which it could appropriately be made even more protective of free speech values.

First, although SB 1160 expressly requires that judicial orders be tailored within the limits of the First Amendment, it would be appropriate for legislation such as this to be more specific with regard to the “narrow tailoring” requirement. Consistent with the First Amendment analysis above, the law should be drafted to minimize the possibility that courts would permit indiscriminate shutdowns of service where conventional policing would be adequate to protect public safety, or where law enforcement objectives could be effectively met by targeting surveillance at persons directly linked to unlawful activity. The legislation should require an agency applying for shutdown authority to document the inadequacy of such measures.

Also, in keeping with the realizations that shutdowns might appropriately be viewed as a kind of prior restraint on speech, any legislation that authorizes the shutdown of mobile service should explicitly state that the government bears the burden of proving that an application meets constitutional standards. Courts should not be allowed to infer that the mere prospect of public protest raises “serious, direct, immediate, and irreparable danger to public safety.” An application for mobile service shutdown should have to provide the court a confident basis that, on facts specific to the public assembly authorities anticipate, danger of that magnitude may reasonably be expected.

VI. CONCLUSION

Mobile communication is an important part of life for millions of individuals and, recently, we have seen a rise in the use of mobile

¹³⁷ *Id.* at (d)(2)(A).

phones as a coordination tool for political activity, including public protests. In the face of an emergency, it is tempting for governments to push for communication shutdowns to resolve the crisis at hand. But, as has already been discussed, such a shutdown blocks all communication and may leave individuals more vulnerable. While mobile communication may be used for ill means, we have also seen the important role it plays in encouraging democratic change, as shown through the uprising in Egypt. When considering the importance our society places on the free flow of speech, and the necessity and expectation of immediate communication, a complete shutdown of mobile service is an undesirable choice as a means to silence dissent, and one that is out of step with the fundamental rights guaranteed to the American people.